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ARE YOU BEING SERVED?

By Linda Shostak

Are you being served? (A check list of steps for defendants in employment cases to take at the beginning of a lawsuit.)

The purpose of this article is to provide a checklist of steps to take at the beginning of a state court case, no matter when you decide to involve outside counsel. The article begins with a listing of issues to address and continues with a discussion of the law and practicalities associated with some of these steps.

1. Service of process: Putting aside the reference to the famous British television sitcom of the 1970s and '80s — Are You Being Served? — the first thing to determine is if the summons and complaint you have received were properly served on the corporation. And if the answer is "no," should you care?

2. If individual employees or former employees are named as defendants, have they been served?

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3. Can the case be removed to federal court? Should you consider removal? What is the relevant timing for removal? Remember that the timing for removal — 30 days from service — is jurisdictional and if you miss the 30 day window, you will not be allowed into federal court.

4. What are the essential facts of the case? Are there any practices or conduct challenged by the complaint that should be examined by the corporation?

5. Has there been an investigation about the facts?

6. Who are the witnesses?

7. Where are the hard copy and electronic documents relevant to the case located?

8. Should there be an immediate suspension of any document retention policy that requires periodic destruction of documents so that relevant hard copy and electronic documents are retained (often referred to as a "hold notice") and who should receive that notice?

9. Are there any hard drives that need to be collected, examined, and/or copied?

10. Are there any apparent conflicts between the corporation and any named individual defendants?

11. Should representation be offered to all individual defendants including former employees?

12. Is the complaint susceptible to legal challenge and strategically do you want to do that at the demurrer or motion to dismiss stage?

13. Is this the time to initiate discovery?

(1. & 2.) Service of Process

A corporation may be served by different means: by hand[1] on an officer or person designated to accept service of process at the work site,[2] by delivery to a designated agent for service of process selected by the corporation and registered with the Secretary of State[3] or through the mechanism of service by mail and acknowledgment of receipt,[4] if that option is used by the plaintiff.

It is relatively easy to serve an in-state corporation. Efforts to avoid service or to argue about whether service is proper are usually wasteful unless used for some strategic reason such as the need for more time. Far more important is to pin down the date or manner of service in order to calculate properly the due date for responsive pleadings or a removal petition. Generally, responsive pleadings are due 30 days after service by hand.[5] Similarly, removal must be effected within 30 days after "receipt through service or otherwise of a copy of the initial pleading." *See* 28 U.S.C. § 1446(b). The time to remove is not impacted by receipt of a copy of the complaint before service has occurred.

One way to assure that there is no dispute as to the date of service is to sign and agree to the acknowledgment of receipt of service of process and the complaint under Code of Civil Procedure Section 415.30, if a plaintiff elects to attempt service by this route. If acknowledgment is given on the 20th day after receipt of the summons and complaint, you will have 50 days from receipt to prepare a responsive pleading.

Also determine whether the individual defendants have been served and if so, when. It is best if you can actually view the notations on the summons because individuals sometimes get the date wrong.

(3.) Removal to Federal Court

Is the case removable either because of complete diversity between the plaintiff and defendants (often defeated by the naming of an individual defendant who is a state resident) or federal question jurisdiction? If the complaint alleges a class action, to remove under the Class Action Fairness Act ("CAFA"), the removal petition must allege and show that an amount in controversy of five million dollars is present. Late last month, the Ninth Circuit held that a defendant seeking removal of a putative class action must only show that this jurisdictional amount in controversy exists by a "preponderance of evidence."[6] This ruling rejects the more difficult standard of establishing the five-million-dollar jurisdictional amount as a "legal certainty," as previously described in *Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994 (9th Cir. 2007), and now rejected by the *Rodriguez* case. Recently, the United States Supreme Court held that a plaintiff cannot stipulate to limit damages to below five million dollars to avoid federal jurisdiction.[7]

When planning to remove a case to federal court, remember that your responsive pleading is usually due seven days after removal if you have not already responded in state court. Fed. R. Civ. P. 81(c) (2)(C).

Also consider strategically whether your case will fare better in federal court with its single judicial assignment system and built-in benchmarks along the way to trial such as initial disclosures, pretrial hearings, more friendliness to summary adjudication and judgment, and a unanimous jury requirement.

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(4., 5., & 6.) Essential Facts of the Case

Investigate the essential facts of the case. Who are the witnesses? Are they still employed with the corporation? Has there been an investigation of the allegations? Have there been any relevant administrative charges or proceedings? Is there conduct alleged in the complaint that should be investigated and addressed, either because an investigation is legally required (for instance, for some discrimination charges) or because the corporation might want to change the challenged conduct in anticipation of either a request for injunction or to blunt the impact of any punitive damage claim? An example of the latter situation might be the discovery that a newly hired employee has brought with him and is using confidential or trade secret information from a competitor in a trade secret case.

(7., 8., & 9.) Document (hard copy and electronic) Retention and Retrieval

After determining the identification of witnesses and what the case is about, you are better positioned to send a document hold notice to all persons and departments involved with the case. Think broadly: include not just the individuals you know who are involved, but also others or departments who logically may have relevant information. For example, with a complaint charging discrimination, send a hold notice to the human resources department as well as to the employee's manager and department head and their administrative assistants.

Enlist not only your witnesses to search for documents, but also your IT department to both implement the hold and search for electronic documents. The retention of relevant electronic documents and files is an absolute must. The failure to implement a proper hold on the document retention policy may be subject to monetary sanctions as well as issue preclusion and default. Also, when you can, retrieve and copy relevant hard drives, especially those of departing or departed employees.

(10. & 11.) Assess Potential Conflicts and Address Representation Issues

Factors to consider: can counsel represent both the corporate and individual defendants? Conflicts sometimes do arise, for example, in the context of harassment cases where the defense may include the proposition that the offending employee was acting outside of the expected boundaries of his work authority and duties.

The issue of conflicts will ultimately be decided by the counsel you hire from the perspective of his or her legal obligations. But the employer must also determine the applicability of Labor Code Section 2802 which mandates that the employer indemnify a defendant employee for "all necessary expenditures or losses incurred. . . in direct consequence of the discharge of his or her duties." This obligation usually translates into the offering of shared representation, including extending offers of representation to ex-employees. On a practical note, representing all defendants, where possible and ethical, enables the corporate defendant to better control the course of the litigation.

(12. & 13.) Motion Practice/Immediate Written Discovery

Demurrers are rarely effective unless there is a pure issue of law on which you have a high degree of confidence in winning. Very often, demurrers result in grants for leave to amend the complaint and, in the interim, the plaintiff has been educated about your theory of the case.

Instead consider serving a notice for the deposition of the plaintiff and a request for documents at the same time you answer. Very often this early approach can result in obtaining admissions at the plaintiff's deposition before his counsel knows much about the case or the defendant.

And finally, don't forget to check if there is insurance coverage!

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UK: Zero-hours contracts in the spotlight

Zero-hours contracts have been hitting the headlines this month in the UK. These are contracts under which employees are not guaranteed any minimum levels of work from one week to the next and are paid only for work actually carried out. They have been hugely popular amongst retail employers for years. However, recent statistics suggest that there has been a significant increase in their use across a range of sectors, with an estimated 4% of the UK labor force now engaged under zero-hours contracts.

For employers the advantages are obvious – a flexible workforce poised to meet seasonal fluctuations in customer demands and cost savings from having no obligation to pay workers when business is slow. And, for some, the flexibility works both ways, allowing workers to juggle several jobs or personal commitments at the same time.

But media reports have named and shamed a number of companies for overuse of such arrangements claiming that workers in a difficult job market are being exploited. The primary objection is that whilst workers are not able to rely on earning a regular income, they are also often restricted from working for any other company.

These types of arrangements are almost unheard of in the rest of Europe. And with increasing media pressure, the UK Government has ordered a review. Given the benefits of such contracts in the right circumstances, an outright ban would seem unlikely. Whether any other practical changes will come to fruition is still up for debate.

1 Cal. Code Civ. Proc. § 415.10.
2 Cal. Code Civ. Proc. § 416.10(b).
3 Cal. Code Civ. Proc. § 416.10(a).
4 Cal. Code Civ. Proc. § 415.30.
5 Cal. Code Civ. Proc. §§ 430.30 and 430.40.
6 *Rodriguez v. AT&T Mobility Services LLC*, No. 13-56149 (9th Cir. Aug. 27, 2013).
7 *Standard Fire Insurance Co. v. Knowles*, 135 S. Ct. 1345 (2013).

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